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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 618

ARKANSAS FUEL OIL COMPANY, PETITIONER,

VS.

MAGRATH OIL COMPANY, RESPONDENT.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari.

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VERDICT AND OPINIONS BELOW.

This case was tried by a jury in the District Court, and the verdict of the jury and the opinion of the District Court are shown in the printed transcript (R. 353, 360, 362).

The jury found the petitioner guilty of breaching its contract with respondent and awarded the sum of $7,500 as damages and also found the appellant guilty of fraud and misrepresentation in obtaining a lease from respondent and awarded damages of $3,000—a total of $10,500. The District Court suggested a remittitur of $2,500 on the breach of contract award and allowed the fraud and

misrepresentation award by the jury to stand. Respondent accepted the suggested remittitur and after deducting the indebtedness of $3,252.81, a net judgment was entered (R. 361-362) in the amount of $4,747.19 on June 26, 1941. Whereupon on July 31, 1941, petitioner appealed to the Circuit Court of Appeals for the Sixth Circuit (R. 363). The case was heard on October 7, 1942, and the judgment affirming the District Court was entered by the Circuit Court of Appeals on October 8, 1942 (R. 509-510).

Petitioner filed a petition to rehear on October 30, 1942 (R. 513-527), and petition for rehearing was denied on December 1, 1942 (R. 529). The Circuit Court's opinion is reported in 131 F. 2d 318.

STATEMENT OF THE CASE.

Respondent filed its suit against petitioner on October 21, 1939, in the Circuit Court of Hamilton County, Tennessee, for damages in the amount of $13,500. The suit was divided into three parts or counts. The first count was for $10,000 damages for breach of contract (R. 6); the second count was for fraud and misrepresentation in obtaining a contract of lease (R. 6-7); the third count was for the cancellation of notes given by respondent in payment of merchandise purchased from petitioner during the period from March 1, 1938, to November 7, 1938 (R. 78). The suit was removed to the Federal Court (R. 13).

Petitioner in 1938 purchased the business of the Patterson Oil Company consisting of nine filling stations and a bulk plant for $75,000 (R. 49). It had been selling its product to Patterson who was acting as its distributor. After buying Patterson's stations, it could control the output of its products and was seeking a new distributor for Chattanooga and the surrounding territory (R. 41, 90).

The respondent was formed with a capital of $9,500 (R. 29) and, after being formed for the purpose, it entered into a contract of lease with petitioner for its nine filling stations and also into a distributor sales agreement to handle its products (R. 375-377 F and R. 411-427).

There were two contracts, one for the lease of filling stations (R. 411-416) and one for the purchase of KOOL-MOTOR gasoline and oils (R. 375-377 F).

One contract, while separate and distinct from the other, was, in reality, dependent upon the other (R. 328-333).

Both contracts were entered into at the same time, but the contract of lease which was obtained through fraud and misrepresentation could not be rescinded by respondent without it being forced to breach or cancel its contract to buy the products described in the distributor's sales agreement. Respondent found no fault with this contract. Gasoline was delivered as contracted by petitioner from its Shreveport Refinery (R. 31-32-33).

Respondent knew during the first month that the petitioner had misrepresented the gallonage going through the stations and immediately took the matter up with petitioner who told them to "go ahead and get the grease racks fixed up, go ahead, get the other pumps put in there, go ahead and push the thing and it would not take long to get the 80,000 gallons through the stations" (R. 42, 44-49, 107-111).

All of respondent's capital had been invested in the business before the fraud was discovered (R. 42) and if the contract had been rescinded then, both the Magraths would have been out of a job and out their entire investment (R. 123).

The damages sued for by reason of the fraud and misrepresentation on the contract of lease were for the period from March 1, 1938, to August 31, 1938 (R. 48-49). During the period, petitioner had not breached its distributor's sales agreement (R. 32).

On November 21, 1938, a new distributor's sales agreement was entered into (R. 396-398 F). This is the agreement which petitioner breached, and upon which damages were awarded.

SUMMARY OF ARGUMENT.

Under the Rules of Civil Procedure for the District Courts of the United States, objections must be made prior to the retirement of the jury as to all matters assigned as error and the fact that no objection was made by counsel for petitioner before the retirement of the jury precludes him from assigning such errors.

When a contract has been obtained through fraud and misrepresentation, and, under instruction from guilty party, subsequent acts are done in affirmance of the contract, the party defrauded does not lose his right to sue for damages.

When a party to a contract upon discovery of fraud and misrepresentation cannot safely discontinue or recede, he is not bound to do so, and acts done in affirmance of the contract do not constitute a waiver of the right to recover damages.

Under a lease contract, a lessee may continue to occupy the premises and demand the damages suffered through the lessor's fraud, and the payment of rent does not raise the presumption of an intent to waive the fraud or the right to damages, and the damages are the difference in the rental value of the premises as they were and as they would have been if as represented.

Where a contract has been made to sell and deliver a certain nationally advertised product and a product of inferior grade and quality and manufactured under ifferent specifications is delivered instead, although falsely labeled and sold as the advertised product by the seller, the act constitutes a breach of the contract and the buyer

may recover damages for such breach to the extent of the actual damage suffered.

The Circuit Court of Appeals made no error in its opinion and the judgment is not in conflict with local law. Neither is it in conflict with any other case decided by any other Circuit Court or the same Court, but on the contrary, the decision conforms to local law and the decisions of the Supreme Court of Tennessee and to the decisions of the Circuit Court of Appeals for the Sixth Circuit in all prior cases.

ARGUMENT.

Both the District Court and the Circuit Court of Appeals considered carefully the claims of petitioner as well as the authorities cited by petitioner's counsel. Both Courts held that the authorities relied upon did not apply to this case (R. 332-509-510). The brief and petition to rehear (R. 513, 527) is practically identical to the petition for certiorari filed in this Court.

Counsel for petitioner also made the same argument to the jury that he makes in his brief, but the jury, being the exclusive judges of the evidence and facts, found the petitioner guilty as charged (R. 347, 361) and the Circuit Court of Appeals found no error (R. 509-510).

Petitioner introduced no witnesses and no proof to dispute any of the evidence or witnesses introduced by respondent.

Under Rule 51 of the Rules of Civil Procedure for the District Courts of the United States, adopted by this Court pursuant to the Act of June 19, 1934, C. H., 651—

> "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Notwithstanding the written "Request for Charge" made by counsel for petitioner (R. 334, 349-352) petitioner's counsel when given the opportunity to do so by the Court (R. 348-349) made no objection to the failure of the Court to charge the jury as requested.

Counsel for petitioner did not make any objection or note any exception to the Court's action in over-ruling his motion for a directed verdict at the time it was over-ruled (R. 333). The Circuit Court held that the questions were not properly reserved for review (R. 509).

Under Rule 51 of the Rules of Civil Procedure, petitioner's petition should be dismissed and on that ground alone the certiorari should be denied.

The Law As to Waiver for Fraud and Misrepresentation.

In 27 Corpus Juris 25, 137, it is stated with authorities cited in notes thereunder, that:

> "Where plaintiff has fully executed his part of the contract, acts thereafter done by him in affirmance of the contract and with knowledge of the fraud do not ordinarily amount to a waiver."

Under Paragraph 138, 27 Corpus Juris 25, it is further stated:

> "The rule permitting acts in affirmance of an executed contract to be performed after discovery of fraud without waiving an action for deceit applies also, generally speaking, to a contract which is partly executed at the time of discovery of the fraud, particularly where further damage would be occasioned to the defrauded party by a rescission, or the past performance is such that the party cannot safely discontinue or recede, or further performance is necessary to determine positively whether fraud has been practised."

The Court below (R. 328-329) very aptly saw the position that respondent would have been placed in by trying

to cancel or rescind the lease contract as the petitioner insists should have been done. Judge Darr said:

> "If your people had been forced to repudiate the contract on the lease and somebody had to buy the supplies, they would have been placed in an unreasonable position—
>
> "But, if during that time, and for some other reason—there is no authority that I have in mind—is undertaking to adjust that, he is also tied up for the contract that is practically inseverable from the lease contract which he has fulfilled during the six month period. Then, that would put a different situation on him, whether or not he would have to repudiate it to his great injury. If he had to surrender his lease or still have had to keep buying the products, he would be in bad shape."

With reference to the case relied upon by petitioner, *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 44 C. C. A. 615, 52 L. R. A. 745, Judge Darr in considering that decision said (R. 332):

> "I think this about it—I think if this lease contract had been just a lease contract and not tied in with the other, I do not believe the plaintiffs could bring suit, nothing else appearing, because I think that is the rule of law stated by Judge Lurton in this case, and is generally recognized to be the ruling law on fraud and deceit—But in this particular case, I think the case is somewhat different. I think the proof though indicates they took it up and tried to get it adjusted and that they had to have stations in order to carry out their distributor's contract to buy, and with the same people, and negotiations were on. I would say in this particular case, it would be an exception to that general rule and they would be permitted to recover if they show that they were actually damaged."

Counsel for petitioner does not discuss in his petition or brief the main issue involved in this case. The principle and general rule permitting acts of affirmance as

quoted from 27 Corpus Juris 25, *Supra*, citing *Harris* v. *Egger*, 226 Fed. 389, are well established. In the *Harris* v. *Egger* case, decided by the Circuit Court of Appeals for the Sixth Circuit through Judge Warrington in 1915, the case of *Simon* v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, was distinguished. The *Harris* v. *Egger* case was also a Tennessee case decided 15 years after the *Simon* v. *Goodyear Metallic Rubber Shoe Co.* case, *Supra*, was decided.

The case of *Jackson* v. *Parsley*, 173 Tenn. 650, 122 S. W. 2d 427, 429, is in point in principle with the facts in this case and the ruling of Judge Darr thereon. In that case, Parsley sued Jackson Bros. for damages for breach of warranty of a truck or, in effect, for fraud and misrepresentation. The buyer after discovering the defect, fraud or misrepresentation immediately notified the seller who told him to "go ahead and use it until the man got there from the factory." The Tennessee Supreme Court held:

> "Under the facts of this case, however, the seller is not in a position to raise this question since, with full knowledge of the defect and the danger attending its operation, it insisted on the purchaser using it until the defect could be remedied. Parsley needed the truck in his hauling business. Necessarily, he would have suffered loss had he refrained from using the truck pending the arrival of a mechanic from the factory, and for such loss the seller would have been liable. To avoid this liability the seller insisted that the purchaser continue to use the truck in its defective condition, trusting thereby that the damages might be less than would result from not using the truck until it could be repaired. Since the purchaser followed the instructions of the seller the latter is in no position to say that he should have disobeyed those instructions and pursued some other course."

The Tennessee Supreme Court in the *Jackson* v. *Parsley* case, *Supra*, quoted with approval *Hayssen Mfg. Co.* v. *Mootz*, 116 W. Va. 204, 179 S. E. 301, and *O. C. Barber*

Mining & F. Co. v. *Brown Hoisting Machine Co.*, 6 Cir., 258 Fed. 1, wherein Judge Warrington said:

> "We think that in each of those cases the conduct of the seller operated to charge it with affirmatively consenting to the buyer's use of the article as a fair method of ascertaining the damages suffered while efforts were being made to remedy the admitted defects."

In quoting from the *Hayssen Mfg. Co.* v. *Mootz* case, *Supra*, the Court of Tennessee said:

> "As grounds of reversing the judgment and setting aside the verdict, the plaintiff relies principally upon two legal propositions; First, that the breach, if any, arose immediately after the defendant began operating the machine and that he had no right to continue in his efforts to operate the same and thereby to pile up damages; second, that it was the duty of the defendant to minimize his loss and that it was reversible error to allow him to recover damages which he might have avoided by adherence to this rule.
>
> "The juridical basis of these propositions is sound, but, under the evidence, which we must view in the light most favorable to the defendant because of the verdict, we are of the opinion that the said legal principles are not controlling herein. This view is taken because the jury was warranted in believing from the evidence that the defendant's continuous efforts through a period of months to operate the machine were encouraged by the plaintiff."

In *Pryor* v. *Foster*, 130 N. Y. 171, it was held that the plaintiff had the right to continue to occupy the premises and demand the damages suffered through defendant's fraud, which were the difference in the rental value of the premises, as they were and as they would have been if as represented; the plaintiff's payment of the rent did not raise the presumption of an intent to waive the fraud or the right to such damages.

The Tennessee case of *Wells* v. *Holley*, 145 Tenn. 345, is not in point in any particular with this case. In that

case, the plaintiff knew before he accepted the deed and paid his money and executed his notes that there was a shortage of acreage. In this case, the Magrath Oil Company did not know of the fraud and misrepresentation until after they had put the money in, signed the lease and operated for some time. They had already suffered their loss, their money was already in the business (R. 42). The notes executed to petitioner were for gasoline and oil, not for rent (R. 8, 301).

After the fraud and misrepresentation was discovered, respondent immediately took the matter up with petitioner and was instructed to go ahead (R. 42); that "The thing to do was to put in new grease racks which the stations did not have, put in other pumps, which the stations did not have, and just get in there and go to work and pull it out" (R. 44). "Go ahead and push the thing and it would not take long to get the 80,000 gallons through the stations" (R. 42).

Finally, after respondent became convinced that it would not get the 80,000 gallons through the stations after being told to "go ahead and push the thing" and after doing so as instructed, he notified the petitioner he was quitting (R. 52).

> "As a matter of fact, I just flatly, I just told them I was quitting. So, finally, Mr. Kendall got in touch with Shreveport and Shreveport went ahead and reduced the rental to one cent per gallon."

Breach of Contract.

The jury from the evidence found the petitioner guilty of having breached its contract by failing to deliver "Koolmotor" gasoline and of delivering a gasoline of inferior quality.

The contract sued upon for breach was executed the 21st day of November, 1938 (R. 396, 398 F) (After the

monthly rental had been reduced on the contract of lease), and the contract provided that (R. 398 E and F):

> "The parties hereto mutually agree that, except as to claims and suits for the purchase price of goods, wares, and merchandise sold under the terms hereof, all claims, demands, and causes of action arising from the breach of this agreement, or from the manner of its performance, or by reason of its provisions and their performance, and asserted by one of the parties against the other, shall not be maintained in any court, unless suit shall be brought on such cause of action within six (6) months of the date of the act, or omissions, giving rise to such claims, demands, or cause of action."

For this reason, suit and recovery by reason of the failure of appellant to deliver "Koolmotor" gasoline was limited to the period from April 21, 1939, to October 21, 1939.

Section 7262 (1)(a)(b) of Williams' Tennessee Code Annotated provides:

> "(1) Where there is a breach of warranty by the seller, the buyer may, at his election:
>
> "(a) accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price;
>
> "(b) accept or keep the goods and maintain an action against the seller for damages for the breach of warranty."

The contract between the parties was a continuous contract and certainly one breach on the part of petitioner in delivering the wrong kind of gasoline and the acceptance of that wrong kind did not bind respondent to accept the wrong kind all of the time. The same conditions with reference to this contract existed as in the case of the contract of lease. If respondent had refused to accept the gasoline and notified petitioner of its intention

to cancel on thirty days notice as insisted upon by counsel for petitioner, then it would have immediately put respondent out of business as all of the stations were advertising Koolmotor gasoline. The pumps had Koolmotor globes (Article VII of the Distributor's Sales Agreement) (R. 398 C), "and discs, frames, sidewalk signs and other advertising materials so as to properly identify buyer's stations for the sale of seller's products." The whole business was set up to sell only the products of petitioner. It could not buy gasoline from other manufacturers and sell them under petitioner's trade names and brands.

Section 7242 of Williams' Tennessee Code Annotated provides:

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows or ought to know of such breach, the seller shall not be liable therefor."

The contract expressly fixes the period of six months as the reasonable time within which notice or suit may be brought by reason of the breach of the contract or "from the manner of its performance or by reason of its provisions and their performance" (R. 398 E and 398 F).

At all times between April 21, 1939, and October 21, 1939, petitioner falsely billed respondent for the gasoline sold and delivered as "Koolmotor" or "KM Gaso" meaning "Koolmotor" (R. 404).

Petitioner represented the gasoline as Koolmotor gasoline:

> "As a matter of fact, both Mr. Bolton and Mr. Kendall represented it as Koolmotor gasoline shipped out of Nashville" (R. 72).
>
> "They endeavored to convince us it was Koolmotor until the definite proof was secured which enabled us to make them admit it was Pan-Am" (R. 301).

In *Cotton Oil Co.* v. *Gin and Lumber Co.*, 138 Tenn. 58, it was held:

> "Where there is an express warranty, the buyer is under no obligation to inspect or examine the goods purchased but may rely on the warranty. The main purpose of a warranty is often to excuse examination and render examination unnecessary and even if the buyer does make an examination of the goods, this does not necessarily do away with the effect of the warranty. A purchaser may examine the goods and exercise his own judgment and at the same time may protect himself by taking a warranty."

In *Marcum* v. *Potter*, 148 Tenn. 251, it was held:

> "The measure of damages for breach of warranty is the loss directly, and naturally resulting, in the usual course of events from the breach of warranty.
>
> "Ordinarily, of course, this loss is ascertained by applying the rule of the difference in price of the animal as warranted and the price as delivered. But this rule is not an invariable one. The purpose of the rule is to ascertain the true amount of the loss actually and directly sustained."

Counsel for petitioner seeks to question the findings of facts by the jury, but our position is that there was sufficient evidence to convince the 12-man jury that petitioner was guilty as charged.

Conclusion.

Respondent insists that no error has been committed by the Circuit Court of Appeals for the Sixth Circuit in failing to apply Tennessee law, and that the decision is not in conflict with Tennessee decisions or other decisions of other Courts or other decisions on the same matter by the Sixth Circuit.

Wherefore, respondent prays that petitioner's petition for certiorari be denied.

Respectfully submitted,

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